IN THE SUPREME COURT OF OHIO

Meryl Neiman, *et al.*, **Petitioners,** **v.** **Secretary of State Frank LaRose, *et al.*,** **Respondents.**	**Case No. 2022-298** Original Action Filed Pursuant to Ohio Constitution, Article XIX, Section 3(A)

RESPONSE TO MOTION FOR SCHEDULING ORDER

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INTRODUCTION

Almost 20 days since the Ohio Redistricting Commission (the "Commission") adopted a congressional district plan (the "Second Plan") Petitioners finally got around to filing a suit challenging the plan. These twenty days were not spent in preparation of a well-thought out suit, but instead creating a procedural circus in two cases where final judgment had already been reached. Now Petitioners seek a blistering schedule with a mere 5 days for Respondents to respond to whatever new expert evidence Petitioners manage to concoct about the Second Plan—with no time for depositions or cross-examination of any evidence. Having shut down Petitioners' circus once, this Court should not allow them an encore performance. The motion for scheduling order should be denied.

BACKGROUND

I. The Commission adopts a new plan.

Following this Court's invalidation of the Congressional Plan passed by the General Assembly and signed into law by Governor DeWine on November 20, 2021 (the "First Plan"), the general assembly did not pass a new remedial congressional district plan within the thirty days provided under Section 3 of Article XIX. Thus, that obligation passed to the Commission.

The Commission met on February 24, March 1, and March 2, 2022 to hear public testimony and to discuss adopting a new congressional district plan. The Commission adopted a congressional district plan on March 2. The Second Plan has been fully implemented by the Secretary of State and all eighty-eight county boards of elections for use in the upcoming May 3, 2022 primary election.[1]

[1] *See e.g.,* the directive to County Boards of Election issued by Secretary of State LaRose on March 2, 2022. https://www.ohiosos.gov/media-center/press-releases/2022/2022-03-02b/

II. Petitioners' procedural hijinks cost time when every day counts in running elections.

Instead of promptly filing a new complaint, Petitioners instead filed a bizarre "motion to enforce" the Court's order against the Commission regarding the First Plan even though the Commission was never a party to that order. As discussed more fully in Respondents' Response to Petitioners Motions to Enforce in *Adams v. DeWine* and *League of Women Voters of Ohio v. Ohio Redistricting Commission*, such a motion was entirely improper. *Adams* Petitioners filed their Motion to Enforce two days after the passage of the Second Plan and the *LWVO* Petitioners inexplicably held their Motion to Enforce until the close of business five days later. Meanwhile, the March 4, 2022 deadline for congressional candidates to file their petitions under the Second Plan came and went.

Then, just as the ill-timed motions to enforce were ripe for decision by the Court, Petitioners delayed a decision even further by filing the instant motions to amend their complaints to add the Commission as a party. Those motions sought to amend a lawsuit that addresses an entirely different congressional plan, passed by different actors, by different methods, and under a different provision of Article XIX. Importantly, these motions to amend came almost ten days after the passage of the Second Plan, and almost 60 days since the final judgment in the respective actions. Petitioners created a procedural circus that cost this Court and the people of Ohio valuable time. Recognizing this, the Court denied the motions to amend in both cases. *See* 03/18/2022 Case Announcements #3, 2022-Ohio-871.

Despite already having a complaint prepared from their Motion to Amend, Petitioners waited an additional three days to file the instant action. We are now 42 days away from Ohio's May 3 Primary election. But while the voting actually *ends* on May 3, it begins much earlier. Particularly, overseas ballots can begin to be mailed now, but must be done so no later than 14

days from today, thanks to an agreement reached between Secretary of State LaRose and the federal authorities with the help of the general assembly. It is highly unlikely another extension will be given.

But, Petitioners continue to play procedural games in their motion for scheduling order . First, Petitioners try to classify this as an expedited elections matter pursuant to S. Ct. Prac. R.1 2.08, when the case is obviously an apportionment case under S.Ct. Prac. R. 14.03, and is classified as such on this Court's docket. Clearly, the Rule 12.08 schedule does not apply. But even if it did, Petitioners are proposing a different schedule than what the Court has established in rule. S. Ct. Prac. R. 12.08 contemplates 5 days for the Respondent to file an answer after service of the summons, with briefing schedules running from that date. Even if Respondents were served yesterday, which they were **not**, under S. Ct. Prac. R.12.08, Respondents' answer would not be due until March 28, because the fifth day would fall on the weekend. Only then would the briefing timeline start, with Petitioners' brief due on March 31, Respondents' briefs due on April 4th, and reply briefs due on April 7—after the new deadline for mailing overseas ballots.

Petitioners' proposed schedule conveniently dispenses with service rules, and asks that the parties spend the next 8 days presenting evidence and briefing (a schedule that generously offers themselves a deadline for reply evidence and briefing).[2] Then, by Petitioners own schedule, the Court could rule (and Petitioners hope grant them relief invalidating the Second Plan), a new plan could be passed, implemented, and ballots mailed in another 6 days. This is absurd on its face and should be denied. Anything else sows confusion into the election, causing Ohioans to reap chaos for 2022.

[2] Petitioners propose this absurd schedule even though Respondents have not yet been properly served.

ARGUMENT

I. Petitioners' Complaint and Motion Must be Denied Based on Laches.

Petitioners' procedural maneuverings are unreasonable, especially given the extraordinary relief they seek within just a couple days of the administration of the May 3 primary election. Petitioners could have filed a new suit the day after the Second Plan was filed, or certainly in the time it took Petitioners to prepare their "Motions to Enforce." Instead, for whatever reason, possibly to avoid additional discovery into what has now become obvious – their experts' flawed and conflicting methodology, Petitioners first filed their specious motions to enforce a court order against a non-party, and then 5-7 days later moved to amend their complaint in a case where final judgment had been issued two months earlier. Three days after the Court denied these motions to amend, Petitioners now stroll to Court to file a new suit – 19 days since the adoption of the Second Plan. While nineteen days may not seem like a long period of time, when dealing with time-sensitive issues like the statewide administration of a primary election that will begin in a few days, nineteen days is an eternity and matters greatly.

This Court has "consistently required relators in election cases to act with the utmost diligence." *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 19. "Laches may bar an action for relief in an election-related matter if the persons seeking this relief fail to act with the requisite diligence." *Smith v. Scioto Cty. Bd. of Elections*, 123 Ohio St.3d 467, 2009-Ohio-5866, 918 N.E.2d 131, ¶ 11. *See also State ex rel. Demaline v. Cuyahoga Cty. Bd. of Elections,* 2000-Ohio-108, 90 Ohio St.3d 523, 526–527, 740 N.E.2d 242, *citing State ex rel. Landis v. Morrow Cty. Bd. of Elections,* 2000-Ohio 295, 88 Ohio St.3d 187, 189, 724 N.E.2d 775 (holding that laches barred relators' mandamus action seeking to revise ballot language for proposed ordinance) ("'[W]e have held that a delay as brief as **nine days** can preclude our consideration of

the merits of an expedited election case.'") (emphasis added); *State ex rel. Newell v. Tuscarawas Cty. Bd. of Elections*, 2001-Ohio-1806, 93 Ohio St. 3d 592, 595, 757 N.E.2d 1135, 1138 (holding that laches barred writ of prohibition seeking to prevent county board of elections and secretary of state from submitting proposed repeal of levies for school district) ("He waited twenty days after the petitions were filed on August 21 to file his September 10 protest, and he then waited another fourteen days following the board's September 27 decision to file this action for extraordinary relief.")

Furthermore, the elements of laches are met here. "The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *Blankenship v. Blackwell*, 2004-Ohio-5596, ¶ 19, 103 Ohio St. 3d 567, 571, 817 N.E.2d 382, 386.

Petitioners knew they intended to challenge the Second Plan in some form. Indeed, the *Adams* Petitioners, who are all the same petitioners here, filed their "Motion to Enforce" two days after the Second Plan was adopted. Rather than file a new lawsuit and proceed as expeditiously as the Court would permit, both *Adams* and *LWVO* Petitioners first filed their "Motions to Enforce" a court order and then later moved to amend their original complaints. *Adams* Petitioners waited to file their motion to amend seven days after filing their "Motion to Enforce", and three days after the motion was fully briefed and ripe for review. *LWVO* Petitioners waited to file their motion to amend five days after filing their "Motion to Enforce", and one day after that motion was fully briefed and ripe for review. Once the Court quickly denied these motions to amend, *Adams* Petitioners, now styled as *Neiman* Petitioners waited another 3 days to file suit.

There is no excuse for such a delay. Petitioners have had ample time to prepare a complaint, as shown by the fact that *Adams* Petitioners filed a proposed amended complaint on

March 11. Moreover, Petitioners' motion to enforce was accompanied by at least two expert reports, so it is clear they had the evidence prepared well in advance of filing the motions to amend the complaint. That Petitioners failed to act even though they had the ability to do so is nobody's fault but their own. Respondents and the people of Ohio continue to be prejudiced by Petitioners' delay tactics. Specifically, with each day that Petitioners continue this procedural circus, election day is one day closer. As articulated by Justice Kavanaugh in *Merrill v. Milligan,* 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays) elections are difficult to administer even under normal circumstances, and Petitioners' delay continues to prejudice candidates and election officials even as an extension to mail overseas absentee ballots was granted, but with a new looming deadline of April 5. Accordingly, laches is a sufficient basis to deny the motion for the untenable scheduling order sought by Petitioners and allow this case to proceed, if at all, on a normal pace while allowing the Second Plan to be used in the 2022 election.

II. The Expedited Discovery Sought by Petitioners Prejudices Respondents and Demonstrates that the Court Should Allow an Adequate and Vigorous Adversarial Process Rather than a Shotgun Hearing Process.

Petitioners file a myriad of evidence from various experts that conflicts with each other and sometimes the experts even conflict with themselves. Petitioners' case relies exclusively on paid expert testimony. But none of the Petitioners' experts have been subject to discovery or cross examination. And Petitioners' own evidence to date demonstrates that it is unreliable and needs to be subjected to a vigorous adversarial process.

Consider the evidence that has been submitted by Dr. Imai and Dr. Chen for the first congressional plan. The Court has been relying on this evidence but it is now clear that it is both conflicting and contradictory. For example, in his first report, Dr. Imai reported that nearly 80% of his simulations resulted in 8 Republican districts, 20% resulted in 9 Republican districts, and

none of his plans resulted in either 10 or 11 Republican districts. But then compare that to the evidence from Dr. Chen on the same issue. In his second report, Dr. Chen compared the political performance of his simulated districts to the Commission's plan using various elections. In Figures A1 through A9, Dr. Chen makes these comparisons using election results in nine different elections.[3] Dr. Chen also compares the Second Plan to his simulations under an index using statewide elections from 2016-2020. *See* March 4, 2022 Chen Report, Figure 1. Under this comparison, a majority of Dr. Chen's simulations result in 10 Republican districts and 5 Democratic districts. But Dr. Imai's analysis claims that only 8 Republican districts would be expected (and rarely 9) (2022-Ohio-89 ¶49). This Court relied upon Dr. Imai's analysis that, in effect, Democrats should expect at least 7 seats. (*Id.*). This conflicts with Dr. Chen's analysis which produces two fewer Democratic seats (5). Using Dr. Chen's result the Second Plan is lawful but using Dr. Imai's it is not. Moreover, using Dr. Chen's result, Dr. Imai's plan is a partisan outlier that unduly favors Democrats. This is not the kind of evidence courts should use to decide constitutional questions.

More critically, Dr. Imai's analysis conflicts with itself. In his first report Dr. Imai predicted that only 20% of his simulations would result in 9 Republican districts and he therefore concluded that plans which resulted in more than 8 Republican districts were partisan outliers that unduly favored Republicans. (2022-Ohio-89 ¶49). The Court expressly relied upon this testimony in its first decision. (*Id.*). But now in his second report, Dr. Imai submits an "example plan," Second Imai Report at 13, that contains 9 Republican districts.[4] Is Dr. Imai's example plan a

[3] Respondents' brief in opposition to the *Adams* Petitioners' Motion to Enforce discussed one of those elections, Chen A1, which used the 2016 presidential election to compare the Commission's districts to Chen's simulations.

[4] Dr. Imai's simulation analysis is fundamentally tainted by a racial target he employs and thus is useless for making the compactness and other comparisons he makes. In running his simulations, Dr. Imai admits that his algorithm was programed, at the request of "relators'" counsel, to always create a district based in

partisan outlier? Is he gerrymandering for Republicans? Of course not. Is Dr. Chen's conclusion that you could expect up to 10 Republican districts mean he is secretly consulting for the Republicans? Of course not. What this does mean, is that all of this "math" is unreliable, especially when Respondents have no opportunity to vet it through the proper adversarial process. It is now plainer than ever that it is dangerous and disingenuous to base Ohio constitutional law and the voting rights of millions of citizens on this untested and contradictory evidence conceived of by paid for hire mathematicians and social scientists.

This also raises questions of due process under the Fourteenth Amendment of the United States Constitution. If the Court relies upon the evidence in front of it now, without reconciling the previous evidence it may in effect be reconfiguring its scheme, unfairly, in *midcourse*—to 'bait and switch,' as some have described it. *Reich v. Collins*, 513 U.S. 106, 111 (1994). This is a due process violation.

The Due Process Clause of the Fourteenth Amendment to the Constitution states that no State shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend XIV, § 1. The Federal Constitution's 14th Amendment Due Process Clause "imposes on the **States** the standards necessary to ensure that judicial proceedings are fundamentally fair,"

Cuyahoga County containing a Black Voting Age Population ("BVAP") of at least 42%. Imai Report at 7. Every district drawn by the simulations is affected by and tainted by this racial target. This use of race to establish a mandatory racial target for the Cuyahoga district would violate the Fourteenth Amendment and subject the state to a claim for racial gerrymandering if the Court relied upon Dr. Imai's simulations to invalidate the Second Plan. There is no evidence here that would satisfy the threshold conditions required under *Gingles* before using race to draw a district at a specific target. *See Cooper v. Harris,* 137 S. Ct. 1455, 1470, 197 L. Ed. 2d 837 (2017) *citing Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S.Ct. 2752 (1986). There is no evidence that Dr. Imai performed a racial polarization analysis or that legally significant racially polarized voting exists in Cuyahoga County or any other location in Ohio. Because Dr. Imai has not produced copies of his simulated maps with corresponding tables showing the BVAP in all of his other districts, we have no way of knowing whether Dr. Imai simulations improperly used race as a proxy for politics. *Bush v. Vera*, 517 U.S. 952, 968 (1996). Accordingly, Dr. Imai's intentional use of race to draw at least one crossover district in every one of his simulated maps, renders each of those maps constitutionally suspect. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009).

Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33 (1981), requiring that litigants receive "notice and opportunity for hearing appropriate to the nature of the case," *Mullane v. Cent. Hanover Bank & Tr. Co.,* 339 U.S. 306, 313 (1950). (emphasis added) Undoubtedly, this Clause's protections of procedural fairness apply to state courts. *See Reich,* 513 U.S. at 110–14; *Bouie v. City of Columbia,* 378 U.S. 347, 354–55 (1964); *Saunders, v. Shaw,* 244 U.S. 317, 319–20 (1917)

The Supreme Court of the United States has repeatedly recognized that a state supreme court cannot give "retroactive effect" to an "unforeseeable" decision, if the application of that decision would deny "a litigant a [fair] hearing." *Bouie,* 378 U.S. at 354–55; *Reich,* 513 U.S. at 110–14; *Saunders,* 244 U.S. at 319–20. In *Saunders,* a defendant won a judgment in a state trial court after that court concluded that the plaintiff's factual claim "was not open to the plaintiff" under then-existing law. 244 U.S. at 319–20. The state supreme court reversed, resting its opinion on a case decided *after* the trial court's judgment, thus making the plaintiff's factual claim legally available to him. But what the state supreme court did not do was remand the action to the trial court to afford the defendant "the proper opportunity to present his evidence" on that now-relevant factual claim. *Id.* at 319. Unsurprisingly, the Supreme Court of the United States reversed, holding that it is "contrary to the 14th Amendment" for a state supreme court to reverse the favorable judgment obtained by a defendant based on the application of a new judicial decision without also remanding to give the defendant "a chance to put his evidence in" to respond to that new decision—at least where the defendant never "had the proper opportunity to present his evidence" before. *Id.*

Respondents here are simply asking for a full and fair opportunity to put on their own evidence, which can only be achieved through a meaningful discovery period that includes time to take meaningful discovery on Petitioners' experts.

III. The Congressional Election Cycle is Underway and this Court Should Defer any Action on the Second Plan Until After the 2022 Election.

The new Complaint and the motion for scheduling order before the Court is not sufficient for this Court to take any action regarding the Second Plan. Any action by this Court should be deferred until after the 2022 election, at the earliest.

In a normal election cycle, "[r]unning elections state-wide is extraordinarily complicated and difficult." *Merrill v. Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Elections officials must navigate "significant logistical challenges" that require "enormous advance preparations." *Id.* But, admittedly, the 2022 election cycle has been far from a "normal" cycle in Ohio. In addition to the challenge of needing to draw new districts and conduct elections under these new districts, this is the first redistricting cycle conducted under Ohio's new constitutional provisions. Navigating these new provisions has proven difficult, with different interpretations of the new constitutional amendments, and changes to Ohio's political geography over the last decade making the difficult work of drawing new congressional districts even more challenging. Exacerbating this already challenging scenario, the Covid-19 pandemic delayed the results of the 2020 census and, in turn, Ohio's redistricting efforts. In fact, due to these converging factors, the Second Plan was adopted only days before the close of Ohio's filing period for the May primary. That filing period has now passed, and campaigns are now in full gear.

In 2006, the United States Supreme Court held in *Purcell v. Gonzalez*, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. 1, 4-5 (2006) (per curiam).

In the wake of this seminal opinion, the United States Supreme Court has consistently admonished courts not to alter state election laws and processes in the period close to an election

Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of stay application) see *also Milligan*, 142 S. Ct. at 879; *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Clarno v. People Not Politicians*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28 (2020) (declining to vacate stay); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam); *Veasey v. Perry*, 574 U.S. 951 (2014).

The 2022 election cycle already underway is no exception. As recent as a month ago, the United States Supreme Court in *Milligan* issued a stay of the district court's order that enjoined the use of Alabama's congressional redistricting plan. In his concurring opinion, Justice Kavanaugh invoked the *Purcell* doctrine for the proposition that courts "should not enjoin a state's election laws in the period close to an election." 142 S. Ct. at 879-880. This is because "filing deadlines need to be met", and candidates need to "be sure what district they need to file for" or even determine "which district they live in." *Id.* Three weeks after the *Milligan* opinion was issued, the Georgia district court in *Alpha Phi Alpha Fraternity, Inc., v. Raffensperger,* followed suit, declining to enjoin the State's redistricting plan due to the *Purcell* doctrine. ___F.Supp.3d___, 2022 WL 633312, 1:21-cv-05337(N.D. Ga. Feb. 28, 2022). Later that same week, Judge McAllister who is assigned to the New York state court challenge to the state Senate and Congressional redistricting plans also indicated that the 2022 elections will proceed under the current redistricting plans on March 3, 2022.[5] And just 2 weeks ago, the United States Supreme Court denied a stay application that, if granted, would have resulted in different congressional districts in North Carolina after the close of their March 4 filing deadline and ahead of North

[5] https://www.nytimes.com/2022/03/03/nyregion/ny-judge-redistricting-maps.html ; https://news.yahoo.com/ny-elections-maps-amid-redistricting-192447324.html

Carolina's May 17 primary. *Moore v. Harper,* No. 21A455*,* 595 U.S. ____ (Kavanaugh, J. concurring). Importantly, in each of these states, any further changes to congressional districts have already been stayed, notwithstanding that each of those states' impending primary will occur *after* Ohio's.

Courts in Ohio have also routinely abided by the *Purcell* doctrine to not meddle with state election laws in a period close to an election. *See Ohio Democratic Party v. LaRose,* 2020-Ohio-4664, ¶ 82, 159 N.E.3d 852, 879 (reversing lower court's grant of preliminary injunction on new election law because "issuing an injunction close to an election increases the harm to the boards of elections and, as a result, the general public by placing the security and administration of the election at risk."); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 740 (S.D. Ohio 2020) (noting that the Supreme Court has "repeatedly emphasized" that courts should not alter election rules "on the eve of an election.") *citing Kishore v. Whitmer,* No. 20-1661, 972 F.3d 745, 751, 2020 U.S. App. LEXIS, at *11 (6th Cir. Aug. 24, 2020); *Boustani v. Husted*, No. 1:06CV2065, 2012 WL 5414454, at *3 (N.D. Ohio Nov. 6, 2012) (declining to grant Plaintiffs relief requiring posting of election notices because court orders on the eve of an election "can themselves result in voter confusion").[6]

This precedent is designed to prevent 11th hour judicial intervention, which risks impinging upon an individual's right with the "most fundamental significance under our constitutional structure"—the right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see also Purcell*, 549

[6] Other state courts routinely apply the *Purcell* doctrine as well. *See e.g. In re Khanoyan,* 637 S.W.3d 762, 764 (Tex. Jan. 6 2022) (detailing the precedent of Federal and Texas Courts in support of refusal to interfere in imminent election through mandamus); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45, 54 (Me. 2020) (denying injunctive relief while holding that a court should not alter election rules close to an election in order to "avoid judicially created confusion"); *Singh v. Murphy*, Doc. No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. App. Div. 2020) (declining to grant an injunction based in *Purcell*); *League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 216 (Iowa 2020) (same).

U.S. at 4-5. Additionally, when a Court makes changes close to the election, these changes "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. Late intervention can also impose significant burdens on state and local elections staff, as well as unfairly impact candidates or political parties. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays).

Petitioners ask this Court to eschew this well-reasoned precedent and create election chaos in Ohio. The election is already upon us. Even assuming *arguendo* the Court had the power to simply substitute its own congressional plan for the Second Plan, which it does not, Petitioners' suggested relief would take weeks, if not months, to adjudicate. And Petitioners demand this relief despite the fact that the State's election cycle is already underway with the May 3 primary election 42 days away and in the midst of overseas absentee voting.

This is the sort of relief the *Purcell* doctrine encourages courts to decline on the eve of an election. And this is true even if the Court believes the Second Plan may be constitutionally circumspect, which, as shown in Respondents' responses opposing Petitioners' motions to enforce in the *Adams* and *LWVO* cases, is not the case with the Second Plan. *See Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays of enforcement where lower court found VRA violations in Alabama's Congressional redistricting plan); *Covington*, 316 F.R.D. at 177 aff'd, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (refusing to enjoin election 2.5 months away despite holding certain North Carolina legislative districts were racial gerrymanders because "such a remedy would cause significant and undue disruption to North Carolina's election process and create considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials."); *Raffensperger*, 2022 WL 633312 (noting that the Court's denial of the preliminary injunction on the basis of the *Purcell* doctrine "should not

be viewed as an indication of how the Court will ultimately rule on the merits at trial"); *Upham v. Seamon*, 456 U.S. 37, 44, 102 S. Ct. 1518, 1522, 71 L. Ed. 2d 725 (1982) (holding that even though there was error by the lower court the interim plan should be used because the filing date for candidates had "come and gone" and the primary was looming.) Therefore, even assuming *arguendo* the Court were inclined to believe Petitioners' arguments that the Second Plan violates Article XIX, Sections 1(C)(3)(a) or (b), which it does not, the Court should allow the 2022 elections to go forward under the Second Plan while adjudicating the merits of Petitioners' claims.

If Petitioners' expansive requested relief is granted at this 11th hour, the prejudice to voters, especially absentee and overseas voters, will be immense. This is exactly the "increased risk" of confusion the Supreme Court warned about in *Purcell. See also Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 42 (2020) (Kagan, J., dissenting) ("Last-minute changes to election processes may baffle and discourage voters…). This, in addition to jeopardizing state and local election officials' ability to prepare for and administer the May 3 primary election. This Court should follow *Purcell* and its progeny and decline to create election chaos in Ohio. This Court should deny Petitioners' Motion for a Scheduling Order on the basis of laches and determine that Ohio is equally too close to the election to invoke even S. Ct. Prac. R.12.08's rapid resolution, therefore allowing the parties full discovery and resolution this year and the ability to enact a new plan for use in the 2024 elections, if needed.

CONCLUSION

For the foregoing reasons, Respondents request that Petitioners' Motion for a Scheduling Order be denied or modified to impose a reasonable discovery schedule that will permit adjudication of the constitutionality of the Second Plan without further disrupting the 2022 election.

Respectfully submitted this the 22nd day of March, 2022.

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